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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

via electronic submission

Re: **Notice of Ex Parte Communication**

CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Dortch:

On the afternoon of November 14, 2002, Brad E. Mutschelknaus of Kelley, Drye & Warren, LLP, Heather Gold of the KDW Group, LLC., and the undersigned, representing Talk America, Inc., met with Linda Kinney, Nick Bourne, Mary McManus, Paula Silberthau, and Debra Weiner of the Office of General Counsel. The purpose of the meeting was to discuss proposals regarding the migration of UNE-P customers to UNE-L raised in the Commission's *Triennial Review* proceeding, and certain legal issues raised thereby, including the States' potential role in establishing market-specific criteria for such migration, pursuant to federal guidelines. There was also a discussion at the meeting regarding the statutory authority for the States to assume such a role, the ability of States under the Act to adopt unbundling requirements in addition to those established by the FCC, the circumstances in which the FCC or the courts might be able to preempt State-established unbundling regulations, and the status of the Section 271 unbundling requirements for loops, switching, transport, and signaling/databases independent from Section 251(c)(3) unbundling requirements.

The attached material summarizes Talk America's position on some of these legal issues and was handed out during the course of the meeting.

Respectfully submitted,

Edward A. Yorkgitis, Jr.
Counsel for Talk America, Inc.

Attachments

cc: Linda Kinney (w/attachments)
Nick Bourne (w/attachments)
Mary McManus (w/attachments)
Paula Silberthau (w/attachments)
Debra Weiner (w/attachments)

Talk America *Ex Parte* Presentation
CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147
November 14, 2002

STATES ARE AUTHORIZED TO ESTABLISH UNBUNDLING REQUIREMENTS IN ADDITION TO THE REGULATIONS ADOPTED BY THE FCC PURSUANT TO SECTION 251 OF THE TELECOMMUNICATIONS ACT

Since the passage of the Telecommunications Act of 1996 (the "1996 Act"),[1] the scope of State authority to establish unbundling obligations in addition to those adopted by the FCC has been affirmed on several occasions. Several incumbent local exchange carriers ("ILECs") including SBC and Verizon, recently have argued in the *Triennial Review* rulemaking proceeding that the Commission now should, as a general matter, preempt State-adopted unbundling obligations.[2] For the reasons explained below, Talk America submits that the States unequivocally have authority under the Act to issue additional unbundling obligations, as long as certain conditions set out in the Act are met. Furthermore, it would premature in this rulemaking proceeding for the Commission to preempt any specific State unbundling requirements. That should happen, if at all, only in an adjudicatory setting upon an appropriate record.

The FCC has on two occasions already concluded that States have the authority to add to the Commission's minimum list of unbundled network elements ("UNEs") that ILECs are required to provide. In the *Local Competition Order,* the FCC concluded that it would identify a minimum number of network elements that the incumbent LECs must unbundle and make available to requesting carriers, and that individual States may go beyond that minimum list and impose additional requirements.[3] The source of that State authority was found in Section 252(e)(3) of the Act.[4] In fact, the Commission rejected the proposal that it develop "an exhaustive list of required unbundled elements, to which States could not add additional elements, on the grounds that such a list would not necessarily accommodate changes in technology, and it would not provide States with the flexibility they need to deal with local conditions."[5] The Commission's *UNE Remand Order* similarly concluded that Section 251(d)(3) allows the State commissions to establish access obligations upon ILECs beyond those imposed

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1 Telecommunications Act of 1996, Pub. L. no. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 251 *et seq*, and amending the Communications Act of 1934 (the "Act").

2 *See e.g.* Comments of SBC Communications Inc., CC Docket No. 01-338 et al. (filed April 5, 2002), pp. 40-43; Comments of Verizon Telephone Companies, CC Docket No. 01-338, et al. (filed April 5, 2002), pp. 63-66.

3 *See Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527, ¶54 (1996) ("*Local Competition Order*") (subsequent history omitted). The adoption of minimum standards was consistent with Congressional intent. The Senate recognized that the FCC "will establish the national minimum standards for opening local telephone networks and other competitive requirements." Senate Commerce Committee Report, S.Rep. No. 104-23, 1st Sess. (1995).

4 Section 253(e)(3) provides that: "Notwithstanding paragraph [252 (e)(2)], but subject to Section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements." 47 U.S.C. § 252(e)(3).

5 *Local Competitive Order,* at ¶ 243.

by the national list, with the sole limitation that the additional obligations comply with the standards in subsections 251(d)(3)(B) and (C).[6] There is no basis to depart from those sound statutory interpretations.

Congress intended for active participation by the States in the implementation of the purposes of Sections 251 and the Act in general, namely the opening up of the ILECs networks, thereby furthering local and exchange access competition.[7] For this reason, Congress preserved State authority to impose additional regulations under several sections of the Act, including Sections 261(c),[8] 252(e)(3) and 251(d)(3). Sections 261(c) and 252(e)(3) preserve the States' general authority to establish and enforce regulations that are consistent with the pro-competitive provisions of the 1996 Act, including the unbundling provisions. In and of themselves, these provisions provide sufficient authority for States to establish additional unbundling elements. However, Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt unbundling requirements even where the Commission does not. In fact, the Eighth Circuit Court of Appeals held that subsection 251(d)(3) specifically deals with access and interconnection obligations and that it "constrains the FCC's authority" to preempt State access and interconnection obligations.[9] If the FCC were to accept the incumbents' arguments that the FCC's national list of UNEs adopted under Section 251(d)(2) could represent a maximum list upon which the States may not build, this would wipe out the State authority preserved to "establish access obligations" under Section 251(d)(3).

Specifically, Section 251(d)(3) permits the States to establish additional unbundling obligations provided only that they do not conflict with the requirements of Section 251, and that they not impede the implementation of Section 251 and the statutory purpose of the competitive provisions of the 1996 Act:

> *In prescribing and enforcing regulations to implement requirements of this section*, the Commission *shall not* preclude the enforcement of any regulation, order, or policy of a State commission that-

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6 47 U.S.C. § 251(d)(3). *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, 3767, para. 154 (1999) ("*UNE Remand Order*") (subsequent history omitted).

7 *Local Competition Order*, 11 FCC Rcd. at 15505, ¶ 2.

8 Section 261(c) states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. § 261(c).

9 *Iowa Utilities Board v. FCC*, 120 F.3d 753, 806 (8th Cir. 1997), not at issue in *AT&T v. Iowa Utilities Board,* 525 U.S. 366 (1999). The Eighth Circuit strongly suggested that a general FCC rule would be inappropriate to preempt any specific state regulations adopted under Section 251(d)(3). *Id.* at 806-07 & nn. 27-28.

> (A) establishes *access* and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(emphases added) This Section makes clear that the States' ability to establish additional unbundling obligations is expressly preserved by Congress and is not some grant of delegated authority that the FCC can regulate away.

Significantly, the States, under Section 251(d)(3), are not bound by the specific limits placed on the Commission when adopting unbundling obligations in Section 251(d)(2).[10] Section 251(d)(3) by its express terms does not require all State access and interconnection regulations to be coextensive with the FCC's regulations promulgated under Section 251 to be consistent with that Section.[11] In taking this position, Talk America is not suggesting that States may impose *any* unbundling requirements. Under Subsection 251(d)(3)(B), any State unbundling obligations must be consistent with the requirements of Section 251. Subsection 251(d)(3)(C) prevents the States from adopting regulations that would "substantially prevent" the opening of the ILEC's networks to competitive carriers that the FCC orders in implementing the competitive provisions of Section 251(c).[12] How these limitations should be applied in specific cases is best understood through reference to well-established preemption principles.

The foundation of preemption doctrine is "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, [which] invalidates State laws that 'interfere with, or are contrary to' federal law."[13] Preemption may be express or implied. Express preemption occurs to the extent that a federal statute expressly directs state law be ousted completely to some lesser degree from a field. Implied preemption occurs either when the *scope* of a statute indicates that Congress intended federal law to occupy the field exclusively (field preemption), or when state law is in actual

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10 Where Congress intended to put limits on the States commensurate with the FCC's implementation, it did so, *e.g.* the Section 252(d) pricing standards.

11 Thus, in the *UNE Remand Order*, the FCC erred in tying State authority to the standards set forth in Section 51.317 of its regulations. States are not bound by the limitations imposed on the FCC, they are bound by the limitations set forth in the Act. *See also Iowa Utilities Board, supra,* 120 F.3d at 807 ("subsection 251(d)(3) would prevent the FCC from preempting [a] state rule [that met the standards of Sections 251(d)(3)(B) and (C)] even though it differed from an FCC regulation.")

12 In addition, state regulations would also be constrained by Section 253(a), among other statutory and constitutional requirements.

13 *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 US 707, 712 (1985).

conflict with federal law (implied conflict preemption).[14] Of the three types of preemption, express preemption and field preemption do not directly apply in this situation because Congress clearly preserved State authority to regulate. Any consideration of preemption of State unbundling regulations should proceed under the "implied conflict" preemption standards.[15] Significantly, the standards applicable to an "implied conflict" preemption analysis under Supreme Court decisions closely parallel the criteria adopted by Congress under Sections 251(d)(3)(B) and (C). The Supreme Court has found conflict preemption *either* where it is impossible for a private party to comply with both State and federal requirements, *or* where State law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[16]

There is no question that ILECs, as a general matter, have been and will continue to be able to comply with *both* minimum federal unbundling obligations adopted by the Commission *and* any additional State unbundling obligations. The States may add to the list, not subtract from the unbundling requirements. (Talk America submits that it is appropriate that the restriction on States removing items from the Commission's national list should remain, as required by Section 251(d)(3)(B). If States could remove unbundling requirements, this would invite a conflict with the requirements of Section 251 and be ripe for preemption.) As long as State access requirements are not in conflict with the ILEC's obligations under the federal rules, so that compliance with both sets of requirements is impossible, the State obligations should be deemed to meet the Section 251(d)(3)(B) requirement of consistency.[17]

Furthermore, state unbundling requirements that go beyond the FCC's requirements will require ILECs, in essence, to open their markets further than the Commission in its rules mandates. Such State requirements would not substantially impede the purposes of the 1996 Act. After all, the Act places an affirmative obligation on ILECs to open their markets to competition, and additional unbundling obligations as determined by States in the context of specific local market conditions, will not impede those federal requirements. Instead, such State requirements would advance the development of rigorous local competition. The States, being much closer to local market conditions and what is necessary to foster competition in those markets through obligations above and beyond the minimum that the FCC requires, can reasonably determine that the promotion of competition in local markets requires more than what the FCC mandated.

Today, in light of the varied and myriad changes that have occurred in local telecommunications markets since the 1996 Act was implemented and local competition has

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14 *Freightliner Corp. v. Myrick*, 514 US 280, 287 (1995). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (where compliance with state law does not trigger "federal enforcement," the state law is not inconsistent with federal law).

15 Verizon agrees that an implied conflict analysis is appropriate. *See* Verizon Reply Comments, CC Dockets No. 01-338 *et al.*, at 53 & n. 151 (filed July 17, 2002).

16 *Id. Compare* Sections 251(d)(3)(B) and (C).

17 *Id.*

been introduced, including the entry and exit of many competitive carriers and the current state of capital markets, the variation in local conditions is even greater than it was seven years ago. A top-down one-size-fits-all approach is even less appropriate than it was in 1996 or 1999. The ILECs argue that the States might go too far and undermine the integrity and viability of an incumbent's network Any such claims need to be examined in specific circumstances in which they are adopted and the markets in which they are implemented. The FCC should not adopt a *per* se rule that all State unbundling obligations thwart achievement of the purposes of the 1996 Act. Were that to happen, it would be the inability of the States to adopt additional access obligations that ultimately would frustrate the pro-competitive purposes of the 1996 Act, rather than *vice versa*.

Even assuming, for the sake of argument, the States' authority preserved by Section 251(d)(3) is subject to some, or all, of the same limitations that apply to the FCC when it adopts unbundling obligations (*i.e.*, the "impair" and "necessary" standards), the FCC cannot issue a blanket preemption in this rulemaking proceeding. The FCC is able to preempt only in the specific circumstance of reviewing a particular State obligation in an adjudicatory proceeding. As demonstrated above, Congress specifically preserved State authority in certain circumstances to adopt additional access requirements. To conclude otherwise through a broad regulation would read the term "access" out of Section 251(d)(3)(A). Thus, at a minimum, the Commission or the courts must consider preemption of State unbundling regulations on a case-by-case basis to avoid reading that State authority out of the statute.

In sum, for the FCC to eliminate authority of States to add additional unbundling requirements for UNE-P or any other network element or combination on the grounds that the Commission alone has the authority to adopt unbundling requirements would conflict with the Act. The FCC may not through regulation overrule Section 251(d)(3) (or Sections 252(e)(3) or 261). Talk America urges the FCC to decline in this rulemaking to preempt sight-unseen all State attempts to implement additional unbundling requirements. Rather, in light of the State authority preserved in Section 251(d)(3) and the limitations placed thereon, the FCC or the courts should consider the preemption of State unbundling regulations, *if at all*, on a case-by-case basis in adjudicatory settings subject to the limitations in Sections 251(d)(3)(B) and (C).

Talk America *Ex Parte* Presentation
CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147
November 14, 2002

THE SPECIFIC UNBUNDLING REQUIREMENTS IN THE SECTION 271 CHECKLIST PERSIST FOR BOCs DESPITE FCC REMOVAL OF THOSE ITEMS FROM ITS SECTION 251(d)(2) LIST OF UNEs

In its *Triennial Review* proceeding, the Commission is considering, among other matters, the extent to which items four through six and item ten of the Section 271 competitive checklist – requiring unbundled loops, transport, switching, and signaling -- establish independent unbundling obligations for the Bell Operating Companies ("BOCs"). 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x). The position of Talk America, as explained more fully below, is that, in the event the Commission determines that these network elements must no longer be provided by a BOC under the Commission's unbundling regulations adopted under Section 251(d)(2) of the Act, the BOC is still required to unbundle these network elements under Section 271 *if* it has received authority under that Section to provide in-region interLATA telecommunications services. In addition, *before* a BOC can obtain Section 271 authority, it must first demonstrate, *inter alia*, that it makes each of these elements available on an unbundled basis *even if* one or more of those network elements are no longer on the Commission's list of UNEs that all ILECs must provide under Section 251(c)(3) of the Act.

Verizon has suggested to the contrary, contending that items (iv)-(vi) and (x) of the checklist do not establish separate requirements apart from any unbundling requirement the Commission might impose under Section 251. Verizon also claims that once ILECs as a whole are no longer required to make one of the four network elements on the checklist available under Section 251(d)(2), a BOC need not unbundle that network element to receive Section 271 authority. Similarly, Verizon has suggested that, even if these checklist items impose separate unbundling obligations, the Commission should forbear from applying them under section 10 of the Act against BOCs that have received Section 271 approval. *Petition for Forbearance of Verizon,* CC Docket No. 01-338 (filed July 29, 2002).

Talk America submits that Verizon's argument regarding forbearance must be rejected for several reasons.

First, checklist items (iv)-(vi) and (x) do not cross-reference Sections 251 or 252 at all. In contrast, checklist item (ii), which sets forth the requirement that unbundling as required under Section 251 must be satisfied by a BOC seeking to provide in-region interLATA services, explicitly does.[1] For this reason, it is clear that Congress meant for items (iv)-(vi) and (x) to be separate and stand-alone requirements from Section 251 requirements, despite any superficial

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[1] Like item (ii), several other checklist items are explicitly derivative of obligations established in other parts of the Act or the FCC's regulations: *see* checklist items (i) (interconnection, cross-referencing Sections 251(c)(2) and 252 (d)(1)), (xi) (number portability, cross-referencing FCC regulations), (xii) (dialing parity, cross-referencing Section 251(b)(3)), (xiii) (reciprocal compensation, cross-referencing Section 252(d)(2)), and (xiv) (resale, cross-referencing Sections 251(c)(4) and 252 (d)(3)). The conclusion is inescapable that, in the checklist, Congress cross-referenced other obligations in the Act when it meant to do so.

correspondence. If these four requirements are not independent from Section 251, then they would be mere surplusage to item (ii). The U.S. Supreme Court has made clear that every provision of a statute must be given meaning. *See Duncan v.* Walker, 533 U.S. 167, 174 (2001), *and cases quoted therein*. Verizon's interpretation would render the four statutory provisions in question redundant with item (ii) and/or nugatory. The Commission in its *UNE Remand Order* recognized as much, where although circuit switching and shared transport need not be unbundled in certain circumstances, "providing access and interconnection to these elements remains an obligation for BOCs seeking long distance approval." 15 FCC Rcd 3696, 3905 (1999 (subsequent history omitted)). Treating these four requirements as separate obligations from Section 251(c) unbundling obligations is the only reasonable interpretation of the statute consistent with the holdings of the Supreme Court.

Second, Verizon's argument that a network element listed in checklist items (iv)-(vi) or (x) need not be unbundled as a precondition for Section 271 authority (or when a BOC is evaluated for "backsliding" (*see* below)) when unbundling of that network element is no longer required of all ILECs ignores the special purpose for which Section 271 was established. The BOCs, alone among ILECs, were prevented form entering the long distance market in their operating territories because of their overwhelming market power. If Congress meant to hold BOCs seeking long-distance authority to a lower standard, it would not have established Section 271. Undeniably, it did mean in the 1996 Act to establish a higher standard for BOCs among ILECs, just as did for ILECs among all LECs (*e.g.*, Section 251(c)) and LECs among all telecommunications carriers (*e.g.*, Section 251(b)).

Third, Section 271(d)(4) of the Act states plainly that the Commission may not "extend or limit" the checklist items "by rule or otherwise." Consequently, the Commission may not remove selective checklist items when reviewing Section 271 applications (or considering claims of backsliding, as discussed below). Rather, all of the checklist items must be considered together.[2]

Fourth, although the Commission has authority to forbear from enforcing the checklist items under Section 10 of the Act when the criteria in Section 10(c) have been met and the requirements of Section 271 have been "fully implemented," Section 271(d)(4) makes clear that the Commission may do so only after Section 271 *as a whole* has been fully implemented. *See* 47 U.S.C. § 10(d). Thus, until all checklist items are appropriately the subject of forbearance, when a BOC applies for Section 271 approval, the BOC must be required to demonstrate compliance with *each* checklist item. (It strains the bounds of logic to suggest that the Section 271 checklist items can be "fully implemented" with respect to a BOC that has not even received Section 271 approval. In that situation, quite plainly, they have not been implemented at all.)

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[2] This is not to say that the "derivative" checklist items discussed above – item (ii) and those mentioned in note 1 -- that are based on Section 251 or Commission regulations cannot, in effect, be "automatically satisfied" if the FCC forbears from enforcing the statutory provisions consistent with the forbearance requirements of Section 10 of the Act, or the underlying regulations are repealed. 47 U.S.C. § 160.

Fifth, the continued applicability of the checklist items to BOCs that have received Section 271 authority is made clear by the backsliding provisions of Section 271. Section 271(d)(6) provides, in relevant part, that if, "after the approval of an application [for in-region interLATA authority], the Commission determines that a [BOC] has ceased to meet any of the conditions required for such approval, the Commission may, after notice and an opportunity for hearing" take corrective action, up to and including suspension or revocation of the approval. If the Commission were to forbear from enforcing the Section 271 checklist items against BOCs that have received Section 271 approval simply because they have received that approval, as Verizon urges, then Section 271(d)(6) would be read completely out of the statute. Because the checklist items are the criteria by which a BOC with approval is judged, *and by which BOC activity is judged even after approval*, the checklist items cannot be "fully implemented" until the Commission makes a determination that market and competitive conditions are such that there is no longer a need to enforce the backsliding provisions.[3] (Again, under Section 271(d)(4), the checklist items may not be limited or extended. This applies equally to any post-approval review for backsliding.) Only after those market conditions are reached with respect to a BOC with Section 271 approval in a given state, may the Commission consider forbearing from requiring *that BOC* comply with items (iv)-(vi) and (x) of the checklist. Significantly, Verizon has not only failed to show that the backsliding provision have been fully implemented, it has ignored them entirely in seeking forbearance.

In conclusion, Talk America opposes Verizon's contentions that items (iv)-(vi) and (x) of the Section 271 competitive checklist create obligations that are subsumed into, and not independent of, both item (ii) of the checklist and the Commission's unbundling requirements under Sections 251(c)(3) and 251(d)(2). The plain language of the provisions of 271(c)(2)(B) establishes these requirements as standalone obligations for any BOC seeking Section 271 approval or that has received Section 271 approval. *See* 47 U.S.C. § 271(d)(6). Congress could not have been more clear – the Commission must not extend or limit the checklist items. 47 U.S.C. § 271(d)(4). Forbearance of the checklist items might be appropriately considered only after they have been "fully implemented" *as a whole*, which for any BOC in a given state will be after Section 271 authority has been granted *and* the need for the backsliding provisions of Section 271(d)(6) are unambiguously no longer required to preserve a fully competitive market for local telecommunications. The Commission should make this plain in its *Triennial Review* order, and Verizon's request for forbearance should be denied.

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[3] On the Senate floor, Senator Pressler, sponsor of the Senate bill leading to the Telecommunications Act of 1996, stated that the checklist items were those things that a competitor of a BOC would require from the BOC to compete both "now and in the reasonably foreseeable future." 141 Cong. Rec. S8,469 (daily ed. June 15, 1995)(statement of Sen. Pressler).